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IN THE

Supreme Court of the United States

October Term, 1954

No 31

BALTIMORE CONTRACTORS, INC.,
Petitioner,

—vs.—

JACOB BODINGER,
Respondent.

RESPONDENT'S REBUTTAL TO PETITIONER'S REPLY BRIEF.

I.

Petitioner's reply brief erroneously describes Respondent's position as being based on the "assumption that there is only one method (equitable defense in an action at law), by which an injunction may issue to restrain the prosecution of an action".

To the contrary, when the stay complies with the basic rule defining an appealable injunction (see Respt.'s main brief, p. 5) and stays another action—an action separate from the one in which the stay is sought—it makes no difference whether the action sought to be stayed is at law or in equity.

The distinction becomes important only where the stay does not comply with the said basic rule, but is claimed to qualify as an injunction under the *Shanferoke* decision (and

its prototype, *Enelow*), since in those decisions the concept that two actions are present and one is staying the other, is merely a legal fiction. The requirement of the *Enelow* concept that the action sought to be stayed be one at law is fully discussed in Respondent's main brief, particularly at pages 10-11.

II.

Petitioner's reply brief also argues that "a Section 3 Arbitration Act order is injunctive in substance". However, the authorities are quite to the contrary:

1. *Enelow* holds that an injunction may be granted only by a court of equity "in the enforcement of equitable principles" and "exercising what is essentially an equitable jurisdiction" (203 U. S. at pp. 382-3). But a stay granted pursuant to Section 3 is not inherently equitable in nature. In *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 987, the Court said:

> "However that may be, the same equitable considerations should surely not be applicable when a defendant asks a stay pursuant to Section 3. For he is not then seeking specific performance (i.e., an order requiring that the parties proceed to arbitration) but merely a stay order of a kind long familiar in common law, equity and admiralty actions. His position is that when the court (to quote Section 3) is 'satisfied that the issue involved in such suit * * * is referable to arbitration,' the court must 'stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' There is well recognized distinction between such a stay and specific performance: The first merely arrests further action by the court itself in the suit until something outside the suit has occurred; but the court does not order that it shall be done. The second, though, the exer-

cise of discretionary equity powers, affirmatively orders that someone do (or refrain from doing) some action outside the suit."

American Locomotive Co. v. Chemical Research Corp., 171 F. 2d 115, 122, held that the granting or denial of such an arbitration stay does not involve the exercise of the *discretion*, which is essential to the consideration of an injunction or any other form of equitable relief.

2. The *Schoenamsgruber* decision established that a court of admiralty, although it lacks general equitable jurisdiction and does not grant injunctions except in limitation of liability proceedings, nevertheless has the power to grant an arbitration stay under Section 3 (294 U. S. at pp. 457-8).

3. The *Shanferoke* decision upon which Petitioner relies did not hold the arbitration stay to constitute an injunction because of any inherent or substantive qualities, but only "for the reasons stated in Enelow", the order there reviewed being "an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b" (293 U. S. at p. 452).

Indeed, an examination of the statute (9 U. S. C. A. 3) reveals nothing which would make an arbitration stay *per se* an appealable injunction. To the contrary, the statute precludes the exercise of any equitable considerations and makes the granting or denial of the stay dependent solely upon whether or not the Court is "satisfied that the issue involved in such suit * * * is referable to arbitration".

Respectfully submitted,

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